

CPI Antitrust Chronicle

February 2014 (2)

Too Much of a Good Thing?:
Is Heavy Reliance on Leniency
Eroding Cartel Enforcement in the
United States?

Megan Dixon, Ethan Kate, & Janet
McDavid

Hogan Lovells LLP

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I. INTRODUCTION

The United States Department of Justice Antitrust Division's leniency program has seen unparalleled success over the past two decades as one of the most effective law enforcement tools available to identify and prosecute international cartels. Leniency has been the key driver in facilitating the Division's takedown of cartels of a magnitude and longevity previously not contemplated by most in the competition field.

Twenty years into its regular use of this powerful tool, however, questions have begun to emerge about whether the Division is relying too heavily on the leniency program, to the detriment of some of its overall enforcement goals. Does dependence on leniency as the cornerstone of one's regime have unforeseen or, at least, undesirable consequences? Should leniency programs play different roles in emerging, established, and sophisticated regimes? Has the success of the leniency program become a bit of crutch? Has the Division's seeming obsession with ever-increasing statistics on the number of dollars fined or of foreign nationals jailed caused it to lose sight of some other important goals? Is it time for the Division to assess critically whether a larger percentage of its resources should be devoted to attempting to detect and prosecute violations that come to its attention via other avenues such as targeted community outreach and econometric market analysis?

Answers to these questions may depend, to some extent, on what you believe makes a cartel enforcement program successful. It seems fair to say that the Antitrust Division has taken the position that Big Is Good. And we wholeheartedly agree that it is in large part the shocking size—in every respect—of some of the cartels prosecuted as a result of the leniency program that have made the U.S. enforcers world leaders in competition policy, and that significantly changed the face of global cartel enforcement just as the “global economy” became a reality.

It is hardly surprising that combining an extremely successful and highly visible program with dwindling resources has led the division to rely heavily on the leniency program over the past couple of decades, and thus its focus on massive international cartels brought in through the leniency program has also made sense. That focus brought significant attention to the harms caused by cartels, thereby propelling cartel enforcement into a previously unknown world spotlight. And, unquestionably, in a gross economic sense blockbuster cartels do more harm than smaller, domestic cartels do.

¹ Megan Dixon is Partner in Hogan Lovells' San Francisco office where she practices complex litigation, with an emphasis on criminal investigations in the healthcare, high tech, and antitrust areas. Ethan Kate and Janet McDavid are Associate and Partner, respectively, in Hogan Lovells' Washington, D.C. office, concentrating on antitrust, competition, and trade regulation.

But we are not convinced that at this point in the U.S. regime's development, the Division should continue to focus the vast majority of its resources on these blockbuster cartels. We are not unaware of, or unsympathetic to, the severe resource constraints the Division currently faces, nor do we suggest that the Division has not pursued and had impressive success outside the leniency-generated blockbuster cartel space. We are simply suggesting that it may be time to take a fresh look and potentially reallocate some scarce resources to other components of the U.S. competition enforcement program.

II. THE RISE OF THE LENIENCY MODEL

According to the Antitrust Division's own statistics, 20 years ago more than 90 percent of the Division's cases were generated through old-fashioned investigation techniques like community outreach; customer, competitor, or employee complaints; economic analysis of markets, bidding, or pricing patterns (often referred to as "screens"); or other forms of proactive investigation. And although the Division has had a leniency program since 1978, prior to the mid-90's it was, according to former Deputy Assistant Attorney General Scott Hammond, "rarely utilized," and responsible for zero detections of an international or even a large domestic cartel.²

What changed in the early to mid-90s? The Division overhauled its leniency policy, making it more accessible and increasing incentives for companies considering self-reporting. Between then and now, the 90/10 numbers have flipped completely, and then some. Again according to Hammond, by 2010 the leniency program was responsible for more than 90 percent of the criminal fines imposed in antitrust cases.³

Key components of the Division's modern leniency program are the "Amnesty Plus" and "Penalty Plus" provisions. Amnesty Plus applies when a company implicated in a cartel investigation discloses previously undetected antitrust offenses involving a different cartel. This disclosure affords the company significant benefits as to its penalty in the first offense, and amnesty as to the second. Amnesty Plus induces companies to clean house, and for those who fail to do so, there is Penalty Plus, under which the Division may recommend sentences above the Sentencing Guidelines range for those same offenses. Amnesty Plus is responsible for at least half of the Division's cases over the past decade.

The Division has created other incentives for potential leniency applicants as well. In 1996, a Memorandum of Understanding ("MoU") between the DOJ and immigration authorities was implemented that makes Sherman Act violations "crimes of moral turpitude" and thereby subjects foreign nationals convicted of antitrust crimes to a 15-year ban from the United States. But the MoU provides for a waiver of the ban for individuals who forego jurisdictional arguments and come to the United States voluntarily and plead guilty. This naturally creates a strong incentive to cooperate for individuals who want, or need, for their employment to continue to travel to the United States. And because the ban does apply to individuals who voluntarily come to the United States to stand trial, some have argued that this agreement

² Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Remarks Presented at the 24th Annual National Institute on White Collar Crime 2 (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.htm>.

³ *Id.* at 3.

unfairly pressures foreign defendants to plead guilty rather than exercise their right to challenge the Division's evidence at trial.

In 2004, the Division won another victory on the leniency front with the passing of the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"), which was intended to increase the criminal penalties for antitrust violations as well as the incentives for participating in the leniency program. Under ACPERA, maximum fines for corporations increased from \$10 million to \$100 million, while fines for individuals increased from \$350 thousand to \$1 million. Additionally, maximum prison sentences for individuals were increased from three to ten years.

ACPERA also further incentivized leniency applicants by reducing potential damages owed to civil claimants and eliminating both treble damages and joint and several liability for successful applicants. Extended for an additional ten years in 2010, ACPERA now also includes a "timeliness" requirement for leniency applicants to assist civil claimants.

III. DOWNSIZING THE DIVISION

While it could fairly be argued that the Division has always been under-resourced relative to the value it creates and the importance of its mission in a free market economy, its resources problem has only become more acute in the past few years, despite its investigations increasing in both frequency and scale. Post-2008 budgets have shrunk, Division employees have been furloughed, and hiring has been frozen. And after the Division closed four field offices in January 2013, its cartel enforcement team was slimmed down by more than 30 percent.

IV. EMERGING CRITIQUE

There is widespread agreement that an effective competition enforcement program should both detect and deter cartel behavior. The principal criticism of leniency as the most heavily relied upon tool in such a program is that its detection component is almost purely reactive, and, standing alone, its deterrent potential may be lower than many forms of proactive investigation, such as market monitoring and outreach and training programs.

The Division has long held, a "prerequisite to building an effective amnesty program is instilling a genuine fear of detection."⁴ True. But some would argue that a regime wherein cartelists may fear being exposed by their co-conspirators in exchange for leniency, but where they face no real danger of otherwise being detected, is lopsided and thus less effective both as a detector of and a deterrent to bad behavior than if resources were more evenly allocated between deterrence and detection.

The reactive approach to enforcement exemplified by a very heavy reliance on leniency and a bias toward blockbuster cartels may be leaving a wide gap where cartel behavior is likely to continue unabated by those who review the statistics and decide they are at low risk of detection. This may be especially true as to smaller or domestic cartels. If cartel enforcement is simply all about huge numbers, perhaps this is acceptable. But in these difficult economic times, those smaller cartels—while undisputedly having a lesser impact on the global economy—may have

⁴ Scott D. Hammond, Director of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, *Cornerstones of an Effective Leniency Program*, presented before the ICN Workshop on Leniency Programs (Nov. 22-23, 2004), available at <http://www.justice.gov/atr/public/speeches/206611.pdf>.

more harmful direct effects on their victims. Take as an example a comparison between the following: a global automobile cartel fixes the price of a part that increases the cost of every car sold over a 5-year period by ten dollars. Let's say for simplicity there are 100 million cars sold during the period. That's a lot of cumulative overcharge! But does paying \$10 more for a car have much effect on the individual victims, who would likely purchase only one car in that period? Probably not.

Take, on the other hand, a domestic dairy products cartel wherein the cartelists agree to increase the prices of milk, yogurt, ice cream, and cheese by 40 percent at all military PXs in the western United States. Regardless of how much those military families in Idaho and Colorado may like cheddar, undoubtedly the volume of commerce—and the effect on the global economy—would be exponentially lower. But the effect on those military families is likely to be significantly more acutely felt than would be paying \$10 more for a new car every five years.

Even participants in a blockbuster cartel may decide that they are unlikely to be detected because, for example, their cartel is so profitable that none of the conspirators is likely to self-report. In a leniency-dependent system, this cartel may not surface until it becomes less profitable and falls apart, such that many of the cartels that are “detected” in this fashion may actually be old news.

A focus on historic cartels also poses a risk that the Division will be too late to prosecute culpable parties. Following the Second Circuit's recent decision in *Grimm*,⁵ courts may require very specific kinds of overt acts in furtherance of a conspiracy to toll the statute of limitations. Payments received merely as a result of a conspiracy may be insufficient to extend the duration of the conspiracy for statute of limitations purposes. In a reactive regime, participants may be unlikely to come forward—even where a previously successful cartel is no longer profitable—when they can instead wait it out for the statute of limitations to pass, thereby avoiding a costly investigation related to a leniency application. While the Division has worked to incentivize leniency applications, *Grimm* may at least give prospective applicants pause before coming forward.

Overreliance on leniency also has the potential to seriously over-punish those who operate in an industry that is currently on the Antitrust Division's “hot list,” especially where many of the conspirators are incentivized by Amnesty Plus to continue to try to offer more and more information on other alleged cartels to curry favor with the Division and collect cooperation credit, and perhaps also to harm their competitors in the process. Not infrequently, much of the “additional” conduct that is offered up, even if technically a violation, is fairly old, fairly marginal, has weak evidence, or has some combination of those problems. Should the Division be spending its scarce resources on those kinds of cases? We would argue no, but the current leniency-dependent model encourages this result.

In Congressional hearings held in November and December 2013, the United States Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights questioned whether the Division has become overly reliant on its leniency program to generate cases. In particular, the Senators expressed concern as to whether the leniency program and the big dollar,

⁵ *United States v. Grimm*, No. 12-4310 (2d Cir. 2013).

low-hanging fruit cases have been unfairly diverting attention from other enforcement tools and goals, leaving the smaller, less sexy cases unaddressed.

In January of this year, Frédéric Jenny, the chairman of the OECD's Competition Law and Policy Committee, and a judge at the Supreme Court of France, stated that there is no evidence that increased enforcement or more leniency applications have decreased cartel behavior. Jenny acknowledged that more enforcement has resulted in a larger number of cartels being detected, but noted that some of the latest investigations concern recently active cartels, which he believes shows that the methods competition authorities have been employing to detect and prosecute are not effectively deterring cartel behavior.

In support of his conclusion, Jenny and others⁶ have pointed to the investigations into LIBOR, Euribor, and auto parts, all of which are recent, massive, and widespread cartels, but which were identified through self-reporting by leniency applicants—not through enforcers' independent investigative efforts. Jenny concluded that given their size and reach, and the fact that industry analysts had questioned the operation of some of these markets long before the investigations began, it was “quite extraordinary that the[se cartels] went unnoticed, which probably shows that the screening of markets is not sufficiently used.”⁷

V. CONCLUSION

The Antitrust Division's leniency program is by all accounts a model for others around the world. It has served the Division supremely well in its cartel-cracking mission for twenty years. But too much of this good thing may be bad for the Division's long-term health. Over-reliance on leniency to prevent and detect arrangements that are axiomatically tight knit and secret is particularly dangerous because it relies on characteristics that are anathema to the wrongdoing that it seeks to address.

Cartels may be among the least obvious examples of conduct likely to be deterred solely by relying on someone coming clean in the hope of leniency, which is why enforcers also need to be out there actively employing other tools to look for violations at the same time. Therefore, the Division should be mindful that relying too heavily on leniency may be detrimental to its overall goal of decreasing harmful cartel activity in the United States and across the globe. Thoughtful consideration of the program in light of the current global economic situation and the Division's own enforcement goals may suggest that some reallocation of resources and/or careful prioritization of pursuits is warranted.

⁶ See, e.g., Rosa M. Abrantes-Metz & D. Daniel Sokol, *The Lessons from LIBOR for Detection and Deterrence of Cartel Wrongdoing*, 3 HARV. BUS. L. REV. 10 (2012).

⁷ See *Cartel activity worldwide has not dropped despite harsher enforcement – OECD Competition Committee chairman*, 6 January 2014, Policy and Regulatory Report.